88-1172

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

NO.

MARION GOWNARIS and JOSEPH GOWNARIS,

Petitioners

versus

UNITED STATES POSTAL SERVICE,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

WHETHER OR NOT THE COURT ERRED IN GRANTING RESPONDENT"S MOTION FOR SUMMARY JUDGMENT WHERE RESPONDENT , UNITED STATES POSTAL SERVICE IS LIABLE FOR TORT CLAIMS IN THE SAME MANNER AND TO THE SAME EXTENT AS A PRIVATE INDIVIDUAL UNDER LIKE CIRCUMSTANCES PURSUANT TO 28 U.S.C. SECTION 2674 AND WHERE NO ISSUES OF FACT EXIST CONCERNING RESPONDENT'S MISLEADING ADVERTISING AND FAILURE TO WARN IN CARRYING OUT A COMMERCIAL VENTURE?

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STATUTES

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28 U.S.C. Section 2671

IN THE SUPREME COURT OF THE UNITED STATES

NO.

MARION GOWNARIS and
JOSEPH GOWNARIS,
Petitioners

versus

UNITED STATES POSTAL SERVICE,
Respondents

PETITION FOR A WRIT OF CERTIORARI

The Petitioners, Marion Gownaris and Joseph Gownaris, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Third Circuit.

OPINIONS BELOW

The judgment Order of the United States Court of Appeals, Third Circuit, rendered November 15, 1988, is unrecorded and appears at page 26 of the Appendix

herein.

The Opinion and Order of the United States District Court for the Eastern District of Pennsylvania rendered June 9, 1988 is unrecorded and appears at page 28 of the Appendix herein.

JURISDICTION

The final judgment of the United States Court of Appeals, Third Circuit was dated 11/15/88. The petition for a writ of certiorari is filed timely, within ninety (90) days thereof.

The jurisdiction of this Honorable Court rests upon 28 U.S.C. Section 1254(1) and Rule 17 of this Court.

FEDERAL PROVISIONS INVOLVED

28 U.S.C. Section 2674

> "The United States Shall be liable, respecting provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages..."

STATEMENT OF THE CASE

a) Procedural History

On May 8, 1987, Plaintiffs/Petitioners filed a One-Count Complaint against Defendant/Respondent, the United States Postal Service, pursuant to the Federal Tort Claims Act.

The parties submitted the case to the United States District Court on a stipulation of uncontested facts and cross-motions for summary judgment.

On June 9, 1988, the District Court entered a Memorandum and Order granting Defendant/Respondent's Motion For Summary Judgment and denying Plaintiffs/Petitioners'

Motion For Summary Judgment. Petitioners timely appealed from the District Court Order. On November 15, 1988, the Court of Appeals for the Third Circuit affirmed the District Court Order granting Defendant/Respondent's Motion For Summary Judgment and denying Plaintiff/Petitioner's Motion. Plaintiffs/Petitioners file this timely Petition For Writ of Certiorari which is now before this Court for disposition.

b) Statement of Facts

The parties stipulated to the following facts numbered 1 through 6 inclusive:

1. On May 14, 1986, Plaintiff, Marion Gownaris, deposited a package with the United States Postal Service for Express Mail delivery.

2. The package was addressed to Joseph Gownaris, C/O Don Tenant School of Real Estate, 1112 G. Beville Road, Daytona Beach,

Florida, 32014 and contained cash in the amount of $3,000.00.

3. Plaintiff, Marion Gownaris, did not inform any Postal Service personnel of the contents of the package when she mailed it.

4. Plaintiff, Marion Gownaris, did not inquire as to insurance for the package.

5. Mrs. Gownaris and Postal Service personnel never discussed the contents of the package or insurance coverage for the package.

6. Mrs. Gownaris believed that the contents of all Express Mail was automatically insured in full because of "guaranteed next day delivery" advertising, and she was not warned otherwise.

Throughout this action, Respondent has mischaracterized Petitioners' claim as one for loss, miscarriage or negligent transmission of mail in an attempt to fit

within an exception to the Federal Tort Claims Act (FTCA), and thus immunize Respondent from liability. Petitioners' claim is NOT and never has been a claim for loss, miscarriage or negligent transmission.

Rather, Petitioners' claim is for damages sustained as a proximate result of Respondent's misleading advertising and failure to warn and/or inform Petitioners regarding lack of insurance. Plaintiffs/Petitioners' Complaint alleges as follows:

> "On or about May 14,1986, Plaintiff, Marion Gownaris entered an agreement with Defendant, United States Postal Service [herein 'Postal Service'], in which the Defendant, Postal Service, agreed to deliver Three Thousand ($3,000.00) Dollars, cash to Plaintiff, Joseph Gownaris, via Express Mail."
>
> (Complaint, Para. 7)

"At the time aforesaid, Plaintiff,Marion Gownaris, paid and instructed the Defendant, Postal Service, by and through its agents, servants and employees at Whitehall, Pennsylvania 18052, to deliver said cash to Plaintiff, Joseph Gownaris, who was then residing at C/O Don Tennant School of Real Estate, 1112 G Beville Road, Daytona Beach, Florida 32014."

(Complaint, Para. 8)

"Prior to and at the time aforesaid, Defendant, Postal Service, engaged in extensive advertising stating that it 'guarantees next day delivery' of items sent via Express Mail."

(Complaint, Para. 9)

"Implicit in Defendant, Postal Service's aforesaid guarantee is that a loss sustained in use of its Express Mail service is an insured loss."

(Complaint, Para. 10)

"In deciding to send cash via Express Mail Service, Plaintiff, Marion Gownaris, reasonably believed and reasonably relied upon Defendant, Postal Service's aforesaid implicit guarantee that a loss sustained would be an insured loss."

(Complaint, Para. 11)

"The Postal Service affirmatively misled Plaintiff, Marion Gownaris, and failed to warn and/or inform her that items sent via 'guaranteed' Express Mail can and/or ought to be insured."

(Complaint, Para. 12)

"As a direct and proximate result of Defendant's aforesaid advertising and of Defendant's failure to warn and/or inform Plaintiff that 'guaranteed' Express Mail can and/or ought to be insured, Plaintiff did not obtain insurance to insure arrival of said cash which insurance Plaintiff

otherwise would have obtained but for Defendant, Postal Services' aforesaid actions."

(Complaint, Para. 13)

"Defendant, Postal Service, by and through its agents, servants and/or employees failed to deliver and/or return the aforesaid cash sent from Plaintiff, Marion Gownaris, to Plaintiff, Joseph Gownaris."

(Complaint, para. 14)

"As a direct and proximate result of Defendant, Postal Service's failure to deliver and/or return the aforesaid cash and as a direct and proximate result of aforesaid misleading advertising and failure to warn and/or inform Plaintiff regarding lack of insurance, Plaintiffs sustained damages due to loss of insurance benefits in the amount of Three Thousand ($3,000.00) Dollars."

(Complaint, Para. 15)

Despite Petitioners' clear claim against Respondent, Postal Service based upon false advertising and failure to warn while engaging in a commercial venture, the District Court accepted Respondent's mis-characterization of Petitioners' claim as one for loss, miscarriage or negligent transmission. The District Court thus granted Defendant/Respondent's Motion For Summary Judgment and denied Plaintiffs/Petitioner's Motion therefor. The Court of Appeals affirmed.

Upon these facts, Plaintiffs/Petitioners' respectfully submit that the District Court order must be reversed. Petitioners thus seek a writ of certiorari.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

Review by Certiorari is appropriate in the case at bar under Rule 17(1)(c) of the Rules of the United States Supreme Court in that a Federal Court of Appeals has decided an important question of Federal law which has not been but which should be settled by this Court.

ARGUMENT

WHETHER OR NOT THE COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND IN DENYING PETITIONERS' MOTION FOR SUMMARY JUDGMENT WHERE RESPONDENT, U.S. POSTAL SERVICE, IS LIABLE FOR TORT CLAIMS IN THE SAME MANNER AND TO THE SAME EXTENT AS A PRIVATE INDIVIDUAL UNDER LIKE CIRCUMSTANCES PURSUANT TO 28 U.S.C. SECTION 2674 AND WHERE NO ISSUES OF FACT EXIST CONCERNING RESPONDENT'S MISLEADING ADVERTISING AND FAILURE TO WARN IN CARRYING OUT A COMMERCIAL VENTURE.?

1. No genuine issue of material fact exists. The parties have stipulated to the facts in this case. The only issue is a legal issue as to whether or not Petitioners may state a claim against Respondents for false advertising and failure to warn and/or inform Petitioners regarding lack of insurance. If Petitioners may state same in a claim, Petitioners are entitled to judgment as a matter of law. Hence, no issues of material fact exist.

2. The Federal Tort Claims Act provides that the United States and its agencies shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances. 28 U.S. C. Section 2674.

3. The Act imposing liability for tort

claims specifically applies to Defendant/Respondent herein, United States Postal Service. 28 U.S.C. Section 2671; Myers & Myers, Inc. v. United States Postal Service, 527 F.2d 252 (2d Cir, 1975).

4. No statutory exception under the Federal Tort Claims Act applies which would immunize Defendant/Respondent from liability in this case. The purpose of the Federal Tort Claims Act was to waive government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability. Rayonier, Inc. v. U.S., 352 U.S. 315 (1957). There is no justification for the court to read exceptions into the Federal Tort Claims Act beyond those provided by Congress. If the act is to be altered, there is a function for the same body that adopted it.

Rayonier, Inc., supra. Also, the United States Supreme Court recently showed a willingness to consider novel claims outside exceptions, Sheridan v. U.S., 56 Law Week 4761, June 24, 1988.

Despite Defendant/Respondent's mischaracterizations of Petitioners' claim, Petitioners' claim is NOT a claim arising out of a loss, miscarriage or negligent transmission barred by 28 U.S.C. Section 2680(b). Instead, Plaintiffs/Petitioners seek damages based upon Defendant/Respondent's false misleading advertising and failure to warn and/or inform Petitioners regarding lack of insurance.

In their Complaint, and throughout this suit, Plaintiffs/Petitioners allege:

> "On or about May 14,1986, Plaintiff, Marion Gownaris entered an agreement with Defendant, United States

Postal Service [herein 'Postal Service'], in which the Defendant, Postal Service, agreed to deliver Three Thousand ($3,000.00) Dollars, cash to Plaintiff, Joseph Gownaris, via Express Mail."

(Complaint, Para. 7)

"At the time aforesaid, Plaintiff,Marion Gownaris, paid and instructed the Defendant, Postal Service, by and through its agents, Whitehall, Pennsylvania 18052, to deliver said cash to Plaintiff, Joseph Gownaris, who was then residing at C/O Don Tennant School of Real Estate, 1112 G Beville Road, Daytona Beach, Florida 32014."

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"Prior to and at the time aforesaid, Defendant, Postal Service, engaged in extensive advertising stating that it 'guarantees next day delivery' of items sent via Express Mail."

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"Implicit in Defendant, Postal Service's aforesaid guarantee is that a loss sustained in use of its Express Mail service is an insured loss."

(Complaint, Para. 10)

"In deciding to send cash via Express Mail Service, Plaintiff, Marion Gownaris, reasonably believed and reasonably relied upon Defendant, Postal Service's aforesaid implicit guarantee that a loss sus- tained would be an insured loss."

(Complaint, Para. 11)

"The Postal Service affirmatively misled Plaintiff, Marion Gownaris, and failed to warn and/or inform her that items sent via 'guaranteed' Express Mail can and/or ought to be insured."

(Complaint, Para. 12)

"As a direct and proximate result of Defendant's aforesaid advertising and

of Defendant's failure to warn and/or inform Plaintiff that 'guaranteed' Express Mail can and/or ought to be insured, Plaintiff did not obtain insurance to insure arrival of said cash which insurance Plaintiff otherwise would have obtained but for Defendant, Postal Services' aforesaid actions."

(Complaint, Para. 13)

"Defendant, Postal Service, by and through its agents, servants and/or employees failed to deliver and/or return the aforesaid cash sent from Plaintiff, Marion Gownaris, to Plaintiff, Joseph Gownaris."

(Complaint, para. 14)

"As a direct and proximate result of Defendant, Postal Service's failure to deliver and/or return the aforesaid cash and as a direct and proximate result of aforesaid misleading advertising and failure to warn and/or inform Plaintiff regarding

> lack of insurance, Plaintiffs sustained damages due to loss of insurance benefits in the amount of Three Thousand ($3,000.00) Dollars."
>
> (Complaint, Para. 15)

In its Memorandum In Support of Defendant's Motion For Summary Judgment, Defendant characterized Plaintiffs/Petitioners' claim as a negligence claim for loss of a piece of mail. The District Court order granting Defendant's Motion For Summary Judgment accepted this mischaracterization. In fact, this is NOT a negligence claim for loss of mail, but a claim against the Defendant/Respondent for misleading advertising and failure to warn/inform regarding the need for insurance, as aforesaid.

Defendant/Respondent went to great lengths to attempt to establish that Express Mail is "postal matter" and therefore,

Defendant is immunized from suit in this case under 28 U.S.C. Section 2680(b). Again Defendant/Respondent misunderstands Plaintiffs/Petitioners' claim. Plaintiffs/Petitioners' claim is NOT a claim for loss, miscarriage or negligent transmission under 28 U.S.C. Section 2680(b). It is irrelevant to this case whether or not Express Mail is "postal matter" under 28 U.S.C. Section 2680(b). This is NOT a claim under the statutory section. Plaintiffs/Petitioners' claim is for false advertising and failure to warn, as aforesaid.

5. Respondent has entered a commercial venture in which it acts like a private enterprise, thus subjecting itself to potential liability. Respondent, Postal Service in advertising and conducting business with respect to its Express Mail service is not

performing a government function which might immunize it from liability. Instead, in offering overnight delivery in accordance with the open market rate, Respondent clearly is competing with private businesses, such as Federal Express and United Parcel Service. Through Express Mail Service, Respondent has entered a commercial venture in which it acts as a private business entity with all its advertising procedures and billings, and establishing accounts for customers.

In providing Express Mail service, Respondent is not involved or engaged in determining the general nature of government business. Thus, Respondent's actions ought not be immunized from liability. See, Liuzzo v. United States, 509 F.Supp. 923 (D.C., Mich. 1981). See, also, Berkovitz, et al. v. U.S., No. 87-498, decided June 13,

1988, 10 Supreme Court Bulletin 18, (where United States Supreme Court held that the discretionary function exception to government torts liability precludes liability only where government actions and decision involved an element or choice that is based on public policy considerations.)

The District Court erroneously relied upon National Mfg. Co. v. United States, 210 F.2d 263 (8th Cir, 1954 in finding for Defendant/Respondent. The National Mfg. Co. case involves a claim against defendant for negligence and misrepresentation in disseminating flood and weather reports. There, the Eighth Circuit found that the Flood Control Act, 33 U.S.C. Section 702C, as well as the Federal Tort Claims Act barred that plaintiff's claim. The Eighth Circuit upheld legislative policy of the Flood Control Act permitting the government

to struggle to conquer floods without being liable for its actions therein. Obviously, that case is not dispositive of the case at bar because of its legal and factual distinctions.

National Mfg. Co. is pertinent here in that the reasoning used by the Eighth Circuit in denying that plaintiffs' claim supports the Plaintiffs/Petitioners' claim in this case. The Court reasoned that that defendant's dissemination of weather information is a purely government activity which is "intended for the public at large and wholly for government purposes." Moreover, the Court specifically noted that the "essential character of this exclusively government activity differs from those in which any comparable private enterprises are carried on." Thus, the Court reasoned that the defendant should be immunized from

liability in performing exclusive government activity. Plaintiffs/Petitioners agree with this logic.

In this case, Plaintiffs/Petitioners' claim for false advertising is based upon the fact that in offering Express Mail Service, Respondent is not performing a government activity which would immunize it from liability. Express Mail service is not an exclusive government activity which differs from those in which any comparable private enterprises are carried on. National Mfg. Co., supra. Instead, Respondent has entered a commercial venture in which it acts like a private enterprise. Accordingly, Defendant is liable to Plaintiffs in the same manner and to the same extent as a private enterprise under like circumstances. 28 U.S.C. Section 2674.

No statutory exception applies to this

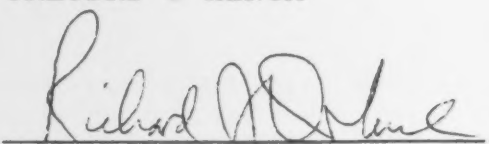
case. The District Court erred in mischar-acterizing,and the Court of Appeals erred in accepting Plaintiffs/Petitioners' cause of action as one for negligent transmission.

No questions of material fact exist, as aforesaid. Plaintiffs/Petitioners are entitled to judgment as a matter of law. The District Court erred in denying Plaintiffs/Petitioners' Motion For Summary Judgment. The Court of Appeals erred in affirming. Hence, this Petition for Writ of Certiorari ought to be granted.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals affirming the trial court's granting summary judgment in favor of Respondent and against Petitioner ought to be reversed.

ORLOSKI & HINGA



Richard J. Orloski,
Attorney for Petitioner

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO.

MARION GOWNARIS and JOSEPH GOWNARIS,
Appellants

v.

UNITED STATES POSTAL SERVICE,
Appellee

On appeal from the United States District Court for the Eastern District of Pennsylvania Civil Action 87-3403 (Honorable Daniel H. Huyett, 3rd)

Submitted Under Third Circuit Rule 12(6)
November 3, 1968

Before: GIBBONS, BECKER and ROSENN,
Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant,and for the reasons set forth in the opinion of Honorable Daniel H. Huyett, 3rd, it is

ADJUDGED AND ORDERED that the judgment of the district court entered June 9, 1988,

be and is hereby affirmed.

Parties to bear their own costs.

BY THE COURT,

/S/ EDWARD R. BECKER

ATTEST:

/S/ SALLY MRVOS,

Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNA.

MARION GOWNARIS and JOSEPH GOWNARIS,	:	CIVIL ACTION NO. 87-3403
v.	:	
UNITED STATES POSTAL SERVICE,	:	FILED JUNE 10, 1988

MEMORANDUM AND ORDER

HUYETT, J. June 9, 1988

Plaintiffs Marion and Joseph Gownaris brought suit against the United States Postal Service (Postal Service) on May 8, 1987 to recover $3000 mailed by Mrs. Gownaris and apparently lost by the Postal Service on May 8, 1987. The parties have submitted the case on a stipulation of uncontested facts and cross-motions for summary judgment. For the reasons stated below, I will grant defendant's motion for summary judgment and deny plaintiff's..op

I. FACTS

On May 14, 1986, plaintiff Marion Gownaris deposited a package with the United States Postal Service for Express Mail delivery. (Stipulated Facts, para. 1). (hereinafter SF). The package was addressed to plaintiff Joseph Gownaris c/o Don Tenant School of Real Estate, 1112 G. Belville Road, Daytona Beach, Florida 32014 and contained cash in the amount of $3000.00. (SF, para. 2).

Plaintiff Marion Gownaris did not tell any Postal Service employee of the contents of the package; nor did she inquire as to insurance for the package. (SF, paras. 3 and 4). Although plaintiff Marion Gownaris and Postal Service personnel did not discuss the contents of the package or any need to insure the package, she believed that the .op

contents of all Express Mail was automatically insured in full because of the Postal Service's "guaranteed next day delivery" advertising. (SF, paras. 5 and 6).

II. DISCUSSION

In its motion for summary judgment, defendant Postal Service argues that this court lacks subject matter jurisdiction because the Postal Service is immune from suit for the loss of mail under sections 646(b) of the Federal Tort Claims Act (FTCA), 28 U.S.C. Section 2680(b), and for claims arising out of misrepresentation under section 646(h) of that Act, 28 U.S.C., section 2680(h). Plaintiffs argue, on the other hand, that their claim is not one for misrepresentation or loss of mail, but is a suit for false advertising and failure to

warn plaintiff Marion Gownaris regarding lack of insurance. As such, argue plaintiffs, their claim does not fall within the exceptions to the FTCA's abrogation of sovereign immunity cited by defendant. Plaintiffs also argue that the Postal Service's Express Mail Service is not a governmental function, and, therefore, should not be immunized from liability under section 646.

The United States and its agencies are immune from suit save as the [United States] consents to be sued...and the terms of its consent to be sued in any court define that court's jurisdiction to hear the case." Lehman v. Hakashian, 453 U.S. 156, 160 (1981). If Congress waives the government's sovereign immunity from suit, a plaintiff's rights are limited to the terms of the .op

government's consent to be sued. Allied Coin Investment, Inc. v. U.S. Postal Service, 673 F.Supp. 982, 984 (D. Minn. 1987). Limitations and conditions upon which the United States consents to be sued must be strictly observed and exceptions to such consent are not to be implied. Soriano v. United States, 352 U.S. 270, 276 (1957).

In 1970, Congress provided a general waiver of immunity for the Postal Service in the Postal Reorganization Act, 39 U.S.C. section 409(c). This section provides in pertinent part:

> The provisions of Chapter 171 and all other provisions of Title 28 relating to tort claims shall apply to tort claims arising out of activities of the Postal Service.

However, section 646 of the FTCA specifically retains sovereign immunity for tort claims against the United States

arising "out of the loss, miscarriage, or negligent transmission of letters or postal matter." 28 U.S.C. section 2680(b). Because plaintiffs' claim, in essence, is nothing more than a claim against the Postal Service for the loss of a package containing $3000 and thus "arises out of the loss...of postal matter," the claim is barred by section 646(b) of the Federal Tort Claims Act. Anderson v. United States Postal Service, 761 F.2d 527, 528 (9th Cir, 1985); Insurance Company of North America v. United States, 675 F.2d 756, 759 (5th Cir 1982); Marine Insurance Co. v. United States, 410 F.2d 764, 767 (Ct.Cl. 1969); Allied Coin, 673 F.Supp. at 987.

It also appears that Plaintiffs' claim, insofar as they allege that the Postal Service in some way misled them, is barred by section 646(h) of the FTCA which retains sovereign immunity for claims "arising out of...misrepresentation."

That plaintiffs attempt to fashion their claim as one for false advertising or failure to warn is of no consequence. While the characterization of this claim as one for false advertising or failure to warn is perhaps artful, the ultimate claim of liability remains misdelivery. Plaintiffs' claim, whether fashioned as one for false advertising and a failure to warn or as one for negligent mail delivery, remains one in tort and, therefore, is barred by the FTCA. Allied Coin, 673 F.Supp. at986 (court rejected plaintiff's attempt to circumvent the FTCA by characterizing his suit as a strict liability suit against a commercial bailee). To allow a suit for false advertising in a case such as this "would be to circumvent the entire statutory scheme, as provided by Congress, and to make possible a recovery where none was ever contemplated." Marine .op

Insurance, 420 F.2d at 766 (court refused to permit the plaintiff to circumvent section 646(b) by characterizing the suit as one for a taking.)

Plaintiffs' argument that the Postal Service should not be cloaked with immunity because it was performing a commercial rather than a governmental function is also without merit. Although Congress did provide a general waiver of immunity for suits brought against the Postal Service in the Postal Reorganization Act, it specifically retained sovereign immunity for the Postal Service as to lost postal matter. 39 U.S.C. U.S.C. 409(c). Nor has Congress ever repealed section 646(b), 28 U.S.C. section 2860(b). "Congress may have launched the [Postal Service] into the commercial world, but it did not send it off to fly alone."

Allied Coin, 673 F.Supp. at 985. Congress kept the Postal Service "under the protective wing of section 2680(b) of the FTCA." Id.

III. CONCLUSION

In short, plaintiffs' claim, which arises out of the loss or misdelivery of a package by the Postal Service is barred by section 646(b) of the FTCA. Therefore, this court lacks subject matter jurisdiction will grant defendant's motion for summary judgment and deny plaintiffs'.

/S/ Daniel H. Huyett, 3rd,